No. 96

IN THE

Supreme Court of the United States

October Term, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellants,*

—*against*—

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, CAROLINE K. SIMON, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Elections constituting the Board of Elections of the City of New York, *Defendants-Appellees,*

—*and*—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ, *Defendants-Intervenors-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellees' Motion to Dismiss or Affirm so greatly distorts the facts, appellants' position, and the applicable law as to necessitate this brief.* Because the motion does not discuss questions two and four presented in the Jurisdic-

*The intervenors have apparently recognized the substantiality of the questions presented by withholding opposition to this Court's noting probable jurisdiction.

tional Statement, this brief will not further reemphasize appellants' belief in the substantiality of those questions.*

Appellants pleaded and proved in the court below that the challenged portion of Chapter 980 purposefully creates segregated voting districts.** As Judge Murphy found, the uncontradicted evidence adequately shows "a legislative intent to draw Congressional district lines in the 17th and 18th Districts on the basis of race and national origin" (J.S. 27a). Indeed, the purposeful segregation created by the statute is "patent." *Note*, 72 YALE L.J. 1041, 1061 (1963).

SUFFICIENCY OF THE EVIDENCE

All of the evidence in this case points to one central conclusion: It would be impossible to draw the district lines on Manhattan Island so as to create a single district with a higher percentage of white, non-Puerto Ricans (95%) and another single district with a higher reverse percentage (87%). The only reasonable inference, therefore, is that the legislative purpose was to create two segregated districts. If the statistical proof thus presented—all that was available in the absence of relevant legislative history—were finally held by this Court to be insufficient to prove purposeful discrimination, "states could with impunity draw legislative district lines on whatever bases they choose . . ." *Ibid.*

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*Appellants believe this case must be considered by the Court separately from *Honeywood* v. *Rockefeller*, 62 Civ. 423, E. D. N. Y., Jan. 18, 1963. Although plaintiffs' first cause of action in *Honeywood* and the second question presented in their notice of appeal involve allegations somewhat similar to those in this case, the nature and quality of the proof submitted in *Honeywood* was vastly different, the two districts there challenged were created by separate portions of Chapter 980, and *Honeywood* involves primarily other issues not raised in this case.

**We have argued in the alternative, that a showing of purposefulness is not required. Jurisdictional Statement "(J.S.)" 14-15.

Specifically, appellants proved that the boundary between the 17th and 18th Districts fences a maximum number of non-whites and Puerto Ricans out of the 17th and into the 18th. Although a major crosstown artery, such as 96th or 110th Street, could have been made the boundary* (thereby tending to eliminate the population disparity between the two districts), the boundary is instead constructed like a staircase, cutting through several census tracts** in a way which places into the 18th that portion of each tract which contains the bulk of the non-whites and Puerto Ricans. And at virtually every one of the other places where the borders of the 17th "cut through" census tracts, the percentage of non-whites and Puerto Ricans placed outside the District is likewise significantly higher than the percentage left in the District. This disparity between the racial character of the population on either side of the 17th's borders is so characteristic of each of its 35 sides that the 17th could not be expanded to any appreciable degree in any direction without a significant increase in its percentage of non-white and Puerto Rican residents.***

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*The boundary between the 19th and 20th Districts, 86th Street, is this kind of familiar dividing line.

**See J.S. 5, first footnote.

***Appellees urge that there are various areas which could have been included in the 17th without altering the percentage of non-whites and Puerto Ricans (pp. 4-5, 14, 15). However, the areas referred to are (i) a warehouse area on the lower west side which could have been added only by the most unseemly gerrymandering; (ii) an area on the upper East Side containing only about 10,000 persons, on which it was decided prior to the enactment of the statute to construct a public housing project of the type in which the average non-white and Puerto Rican occupancy is 73.4% in New York City (Pltfs.' Exh. 7); and (iii) an area west of Stuyvesant Town (R. 143-44, 155-66, Pltfs.' Exh. 4B), the exclusion of which supports appellants' position. It is more logically contiguous to the 17th than Stuyvesant Town and contains 12.2% non-whites and Puerto Ricans, a percentage 24 times as large as the comparable Stuyvesant Town percentage.

The evidence also showed that one area from the old 17th was placed into the new 18th—the area with the old 17th's highest percentage of non-whites and Puerto Ricans; that the new 17th received the two remaining areas on the Island with the largest white, non-Puerto Rican population, and that the virtually all-white 17th was kept 12%-15.4% smaller than the three adjoining districts.

As can be expected when a legislative majority uses criteria of race and place of origin in drawing a districting statute, the effect is to dilute the political power of the minority groups: non-whites and Puerto Ricans have been concentrated in a single district and eliminated as an effective political force in the other three. By contrast, in two of appellants' hypothetical plans, which were drawn without regard to race or place of origin,* there are three districts containing more than 30% non-whites and Puerto Ricans, and the other hypothetical results in two districts with more than 50% non-whites and Puerto Ricans.

Moreover, the political power of the minority groups is further diluted by the fact that almost 97% of the Island's non-whites and Puerto Ricans are placed in districts where their votes—because of the smaller relative population of the 17th—are 12%—15.4% less valuable than the votes of the 17th's inhabitants.

Appellees contend that these facts are "commonplace" (p. 10) because, like Judges Moore and Feinberg, they consider appellants' evidence bit by bit as separate "avenues of proof" (p. 11). In so doing they ignore both common sense and the settled practice in cases where the question is: On all the facts, are plaintiffs entitled to prevail? The requirement in such cases is not that the proof be "balkanized," but that the "totality of circumstances" be weighed. *Johnson* v. *Virginia*, 31 U. S. L. W. 3353 (April 29, 1963).

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*Contrary to Appellees' assertion (p. 12), these hypotheticals were viewed by both Judges Feinberg (J. S. 23a) and Murphy (*Id* 31a) as embodying rational bases for establishing districts.

STANDARDS OF PROOF

As appellees' motion indicates (pp. 12-13), the Court below in effect required appellants to prove more than is legally required in a segregation case, and is inconsistent with *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960) and every other segregation case to have touched on the issue.* As the Court indicated in *Gomillion* (364 U. S. at 341), plaintiffs' burden is to show segregation of white and colored voters; the responsibility then shifts to the defendants to justify the legislation.

Appellees argue, however, that plaintiffs have the burden of proving that the statute does not rest upon any "reasonable basis," citing two cases in the economic regulation field, *Morey* v. *Doud*, 344 U. S. 457 (1957), and *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580 (1935). That such cases are not relevant is underlined by the recent decision of this Court in *Ferguson* v. *Skrupa*, 31 U. S. L. W. 4376 (April 22, 1963). Segregation of persons on the basis of race or place of origin is the sort of "invidious discrimination" which offends the constitution *Ibid.* As Mr. Justice Holmes stated for the court in a case involving the right to vote in Congressional elections,

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right setup in this case." (*Nixon* v. *Herndon*, 273 U. S. 536, 541 (1937)).

Judge Feinberg's reference to appellants' "difficult burden" and his question: "would racial discrimination be 'the

*Although *Gomillion* was in this Court on a motion to dismiss prior to trial, the factual allegations in the affidavits submitted in support of that motion, which were accepted as true, were quite extensive. And this Court's ruling implied that, if proven at trial, those facts would sustain the plaintiffs' case.

only available inference' from these figures?" (J.S. 24a) illustrate the way in which the erroneous standard infected the lower court's decision. By putting his question as he did, instead of asking whether discrimination would be the *most probable* inference from appellants' proof, and by rejecting the sufficiency of that proof, Judge Feinberg's opinion in effect tells plaintiffs in segregation cases that as part of their affirmative case they must introduce evidence to rebut all other possible inferences.

In a case such as this, in which the legislative history has been purposely or inadvertently obscured, affirmative rebuttal of every other potentially "reasonable basis" or "available inference" would impose a staggering burden upon plaintiffs. Moreover, plaintiffs could still be faced for the first time on appeal with the contention that various other bases or inferences (such as those mentioned on page 12 of appellees' motion) could be deemed "reasonable" or "available" in the circumstances. In this type of case, once plaintiffs have made a *prima facie* case, the adversary system imposes upon defendants the obligation to come forward with any supposed justification that may exist. Any other rule leads not only to unfairness to plaintiffs, but also to the necessity for such beyond-the-record speculation as that in which Judge Feinberg felt compelled to engage (J.S. 17). As concluded by the *Yale Law Journal*,

> "requiring a plaintiff to disprove all other permissible bases seems to impose on him the impossible task of rebutting all phantom bases on which a statute might have been drawn. Without requiring a state to introduce evidence tending to show some other explanation [than race] for the statute, a court could not generally determine whether other alleged bases are plausible." 72 YALE L.J. at 1059.

Appellees' motion also compounds the error of Judge Moore in the court below by considering as constitutionally

relevant the question whether the individuals subject to the statute were "helped or harmed" (p. 11). In so doing, appellees misconstrue appellants' argument by stating that it would require "dispersal" of minority groups. Appellants merely contend, of course, that statutes must be drawn wholly without regard to considerations of race or place of origin—that they must be completely "neutral" in so far as such facts are concerned.

The singling out of non-whites and Puerto Ricans for special treatment and jamming them into a separate district has much the same harmful effect as placing them in separate schools or requiring them to sit in separate seats in a courtroom *Johnson* v. *Virginia, supra*. Since Congressional districts are political subdivisions within which various public and private activities are organized, it is "no longer open to question" that a state may not constitutionally require their segregation. *Ibid.*

Moreover, harm must be presumed to flow from the use by a legislature of considerations of race or place of origin since a legislative majority will inevitably manipulate election districts to the detriment of a minority if permitted the unrestrained use of such considerations. The facts of this very case, re-emphasized at the outset of this brief and more fully discussed at 72 YALE L. J. at 1052-53, illustrate the evils. And a rule which permits use of racial criteria in New York would permit such use elsewhere. See *Gomillion* v. *Lightfoot, supra*.

Recognizing that they are on weak ground in regard to matters of proof, appellees attempt to mislead the Court into believing that they introduced significant evidence at the trial. In fact, the single table referred to in their motion (p. 5) did not "highlight" their evidence: it was the only item of proof they voluntarily offered.*

*The table, which did not even warrant comment in any of the opinions below, made the irrelevant point that the expanded 17th District contained a few more non-whites and Puerto Ricans than the old

SCOPE OF REVIEW

As a last resort, appellees try to convince this Court that the case should not be reviewed because the issues are purely factual (p. 8) and that this Court may not review the record *de novo*. They contend that:

> "*de novo* review is restricted to the rare situations where state courts deny constitutional rights under the guise of fact-finding." (p. 9).

Nowhere do they indicate why this case is not one in which "fact-finding" has actually determined constitutional rights, or why *only* state court decisions of this type should be accorded *de novo* review.

And no such indications are possible. This case, without doubt, is one where the

> "conclusion incorporates . . . criteria for judgment which in themselves are decisive of constitutional rights" *Watts* v. *Indiana*, 338 U. S. 49, 51 (1949).

Just as the *Watts* "factual" conclusion of no coerced confession would, if not reviewed and reversed by this Court, have established a constitutional standard permitting almost unrestrained extortion of confessions, so this case would permit unrestrained segregation of voting districts and other political units. In such a situation the general rule enunciated in *Niemetko* v. *Maryland*, 340 U. S. 268, 271 (1951) is applicable:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

17th District. However, as appellants showed, the percentage of nonwhites and Puerto Ricans in the 17th District was reduced from 6.6% to only 5.1% (J.S. 7). The maps identified in the record as Defendants' Exhibits C through H were furnished in response to a specific demand for them by the presiding judge of the court below (J.S. 4a).

Rather than imposing an "undue burden" upon this Court, claimed denials of constitutional rights, "though cast in the form of determinations of fact, are the very issues to review which this Court sits." *Watts* v. *Indiana, supra.*

Finally, the fact that this case comes directly to this Court from a lower federal tribunal makes it an *a fortiori* case for the *de novo* review allowed by the above-cited state cases. Such cases have generally passed through three levels of appellate scrutiny in state courts whereas this case has not been reviewed by any appellate tribunal. Moreover, this Court should be less reluctant to review the record of a Federal court than of a state court, since the latter might be accorded additional deference due to considerations of Federalism.

CONCLUSION

The Motion to Dismiss or Affirm should be denied and this Court should note probable jurisdiction.

Respectfully submitted,

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